

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing)
Procedures to Be Followed When)
Formal Complaints Are Filed Against)
Common Carriers)

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COMMENTS OF

AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION
("ACTA")

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America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits its initial comments in response to the Notice of Proposed Rulemaking, released November 27, 1996, in CC Docket No. 96-238 ("NPRM").¹ ACTA is a national trade organization whose membership consists primarily of interexchange carriers, and also includes operator service providers, payphone vendors, competitive local service providers, equipment vendors, consultants and others interested in, and dependent upon, the advancement and maintenance of fair and equal competitive conditions in the present and future telecommunications marketplace.

I. INTRODUCTION

1. ACTA supports the Commission's goal of faster resolution of all formal complaint proceedings. ACTA agrees that delay under the current rules can be a barrier to entry and to effective enforcement. Further, ACTA believes that faster resolution of complaints will result in lower litigation costs, which would be of particular benefit to smaller carriers.

2. As a general matter, ACTA notes that the formal complaint procedures have not as yet caught up with the changed structure of the telecommunications industry. Most formal complaints used to be disputes between an end-user customer and its carrier over rates or service. Now, most formal complaints fall into one of two categories: 1) the traditional, two-party, customer v. carrier dispute over rates or service provided the non-carrier end user, and 2) the more modern carrier v. carrier dispute, essentially a dispute between competitors over anti-competitive conduct such as an improper refusal to provide service or discriminatory conduct; many complaints of this type are brought by resellers. ACTA submits that the two types of

¹ References to the NPRM will be by paragraph number.

disputes are very different, with the latter tending to be more contentious, to involve more money, and to have an unnamed third party--the public, whose interests are not being directly and exclusively represented by counsel. These carrier v. carrier disputes, which almost always involve consideration of the public interest, particularly with respect to the availability and cost of services as they should exist in a truly competitive environment, often warrant even more expeditious resolution than the customer-carrier type of complaint. In order to both reduce processing time and to ensure that the public interest is fully represented in these carrier v. carrier disputes within these extremely short time frames, the Commission should give serious consideration to returning to the use of a separated trial staff, a public counsel to give special voice to the public interest. Additionally, it may be of some use to consider using separate methods of processing the two types of complaints, or at least highlighting the case types differences on the proposed intake form.

II. PROPOSED AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

A. Pre-Filing Procedures and Activities

3. ACTA supports the addition of a requirement that a complainant, as part of its complaint, certify that it discussed the possibility of a settlement with the defendant carrier's representative prior to filing a complaint (NPRM @ ¶ 28), and would extend the certification requirement slightly to include the statement that such discussions were undertaken in good faith. ACTA agrees with the proposal that failure to so certify should result in dismissal of the complaint.

4. It is too often the unfortunate reality of litigation that larger carriers have far less economic impetus to settle cases quickly. It is also often true that cases settle only when they get

to the stage of “on the courthouse steps.” ACTA believes that any support for or emphasis on settlement discussions that the Commission provides could be beneficial. It may be that the most important thing the Commission can do to facilitate settlement is to ensure that cases get to the “courthouse steps,” the procedural stage where a decision will be rendered soon, as quickly as possible.

5. ACTA also notes that a unique situation exists when a facilities-based carrier files a formal complaint for “slamming” against one of its own resellers. In such cases, the facilities-based carrier may be the only source for documents which disprove the slamming allegations. The Commission should consider adding to its proposed intake form a requirement that a carrier-complainant in a slamming case against one of its own resellers has checked its own records for documents which would disprove its allegations, and, if such documents are found, to verify and disclose them in a timely fashion.

B. Service

6. ACTA supports the proposal to require a complainant to effect service on the defendant carrier, the Commission, and the Chief of the division or branch responsible for handling the complaint. ACTA supports the establishment and maintenance of an electronic directory available on the Internet of agents authorized to receive service of complaints on behalf of carriers that are subject to the Act and of the relevant Commission personnel who must be served. However, in view of the shortened time limits proposed by the Commission, ACTA recommends that parties be required to serve whomever a carrier designates in addition to effecting service which will satisfy the requirements of 47 U.S.C. § 413. ACTA recognizes that the Commission cannot change a statute in a rulemaking proceeding. However, with nationwide

overnight delivery available, to limit the service requirement to, in most cases, an artificial agent in the District of Columbia seems unnecessarily inefficient. Such will cause the loss of at least one day in getting documents to those who actually need them in order to respond to them, and may lead to confusion and additional requests for delay. ACTA supports the proposal that all subsequent pleadings be served by overnight delivery or by facsimile to be followed by mail delivery (NPRM @ ¶35).

C. Format and Content Requirements

7. ACTA opposes the prohibition of complaints that rely solely on assertions based on “information and belief” (NPRM @ ¶ 38). In cases where a small carrier brings a complaint against a large carrier, oftentimes the complainant will know of the existence of documents but those relevant documents are in the sole possession of the defendant/large carrier. To prohibit complaints brought on information and belief could preclude smaller carriers from bringing legitimate complaints. Additionally, the Commission already has tools available to sanction those who bring unwarranted, improper, or frivolous complaints.

8. ACTA generally supports the Commission's proposal that all pleadings seeking Commission orders contain proposed findings of fact, conclusions of law, and supporting legal analysis (NPRM @ ¶ 41). To some extent, the added cost to the parties of such submissions may be offset by the value of the contribution such a filing would make to the speedy resolution of the case. ACTA would simply note that larger carriers with larger budgets will have the resources to put numerous attorneys working on such a filing, should they choose to do so, and that smaller carriers have more limited budgets. The Commission should keep in mind the imbalance of resources of the parties when administering this aspect of the new procedures.

9. ACTA supports the proposal to require the complaint, answer, and any authorized reply to include the additional information as set out in NPRM @ ¶ 43.

10. ACTA supports the proposal that parties should be required to append copies of relevant tariffs or tariff provisions (NPRM @ ¶ 45). Additionally, where there is any issue of which version of a tariff or tariff provisions applies, the party whose tariff is at issue should be required to provide all arguably relevant versions of the tariff or tariff provision, that is, the party should include the prior versions of provisions subsequently amended, if those prior versions were in effect during a time period critical to the dispute.

D. Answers

11. ACTA supports the proposal to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days after service or receipt of the complaint (NPRM @ ¶ 47), particularly in the carrier v. carrier type of formal complaint, where the complainant has usually already suffered competitive harm and time is of the essence. ACTA would support reducing the time to answer even further, to 15 or even 10 days after service of the complaint, providing that the Commission allow for supplementation within 5 to 10 days if needed in order to comply with NPRM @ ¶ 43's requirement to provide or list all relevant documents if the search for such documents was not completed by the time the answer must be filed.

E. Discovery

12. ACTA believes that the most important matter affecting processing times is discovery. The Commission must find a means of eliciting relevant evidence quickly if it is to meet the new time lines, yet it must not reduce its commitment to due process. ACTA will

reserve comment on several discovery proposals until it files its reply comments, after it has a chance to review and consider all the comments filed.

13. ACTA does not believe that discovery should be left entirely to the discretion of the Commission staff (NPRM @ ¶ 50), nor should any written interrogatories be limited to questions designed to illuminate specific factual assertions or denials contained in complaints and answers (NPRM @ ¶ 51). Regardless of the expertise of the particular staff member handling the case, the staff member cannot possibly have a factual background and understanding equivalent to that of the parties themselves, particularly early on in the case. ACTA believes that the complainant must be able to direct the case as the complainant sees it, subject of course to the defendant's objections, and that to do otherwise flies in the face of due process.

14. ACTA supports the proposal to require that objections to interrogatories must be filed by the date of the initial status conference (NPRM @ ¶ 52).

15. With regard to NPRM @ ¶ 53, ACTA believes that documents of decisional significance in either party's view need to be filed with the complaint and answer in order to shorten processing times. Parties are capable of discerning the difference between decisionally significant documents and truckloads of irrelevant paper and are required to understand the difference daily by courts all over the country. Should the Commission become aware that a party has engaged in gamesmanship in deliberately over-filing paper for the purposes of delay or for nuisance value, the Commission should use its biggest sanction, that of drawing an adverse factual inference from the conduct of the party.

16. With regard to NPRM @ ¶ 55, ACTA believes that the Commission should use its biggest sanction, that of drawing an adverse factual inference, from the conduct of the party.

17. ACTA generally supports the proposal to authorize the Common Carrier Bureau to refer such disputes to an administrative law judge for expedited hearing on factual issues (NPRM @ ¶ 56), as long as the Commission can find very qualified ALJ's familiar with communications history and technology.

F. Status Conferences

18. ACTA supports the Commission's proposal to amend Section 1.733 of its rules to require that an initial status conference take place in all formal complaint proceedings 10 business days after the defendant files its answer (NPRM @ ¶ 58). ACTA believes that the more and the earlier communication occurs between the parties and staff, the more rapidly cases will be resolved.

19. ACTA supports the Commission's proposal that the parties submit a joint proposed order memorializing the oral rulings made during any status conference (NPRM @ ¶ 59). ACTA would just caution that, even when a discussion is taped and can be reviewed after the fact, it is possible that the parties may not understand a ruling to mean the same thing, and may be unable to agree, both in good faith. The Commission should provide for such an eventuality.

G. Cease, Cease-and Desist Orders and Other Forms of Interim Relief

20. With regard to NPRM @ ¶ 61, ACTA believes that as a general matter the Commission should use traditional court rules, procedures, and standards which attorneys nationwide are familiar with unless there is a compelling reason to do otherwise.

H. Damages

21. ACTA does not oppose the proposal that any complaint seeking an award of damages contain a detailed computation for damages (NPRM @ ¶ 66). Many complainants may prefer to litigate the damages issue in federal court after obtaining a finding of liability at the Commission. The Commission might consider recognizing and codifying this latter process.

I. Motions

22. ACTA disagrees with the proposal to continue to make the filing of oppositions to motions permissive, but yet make failure to file an opposition to a motion possible grounds for granting the motion (NPRM @ ¶ 77). If failure to file an opposition were grounds for granting the motion, then the filing of an opposition is not optional in any real sense. The Commission should not require the filing of an opposition to a motion that should clearly not be granted. Additionally, it should not be burdensome for the Commission to very briefly articulate some ground for the granting of a motion other than the lack of an opposition being filed.

23. With regard to NPRM @ ¶ 78's proposal to prohibit amendment of complaints except for changes required by 47 C.F.R. § 1.720 (g), ACTA would oppose the provision as written. While the complaint should be fully developed prior to filing, there are occasions when information is obtained during discovery, or by other means after the filing of the complaint, which was not obtained prior to the filing of the complaint even though due diligence was exercised. On some such occasions, the complaint may need to be amended as a result of the later-obtained information, and Commission prohibition of such amendments would seem to violate due process standards.

J. Confidential or Proprietary Information and Materials

24. ACTA reserves comment on the proposal to allow parties to designate as proprietary any materials generated in the course of a formal complaint, and to not limit such designation to materials produced in response to discovery (NPRM @ ¶ 79). Generally, while such a rule seems appropriate in light of the Commission's desire to get parties to file more information earlier and voluntarily during the proceedings, ACTA recognizes that proprietary designations are subject to abuse. There have been cases where it would have been beneficial, in terms of gathering relevant factual information to promote a speedy and informed resolution of a case, for the Commission to take notice of information filed in another of its own proceedings, but was prevented from doing so because the information had been designated as confidential or proprietary.

K. Other Required Submissions

25. ACTA opposes NPRM @ ¶ 81's proposal that briefs be prohibited when discovery is not conducted, and opposes any staff limitation of the scope of such briefs. ACTA believes that parties need to be allowed to file briefs explaining and arguing the case as the parties see it, after the pleadings are filed, whether or not discovery is conducted, and on such issues as the parties themselves deem relevant.

26. With regard to NPRM @ ¶ 82, ACTA recommends that the rule require any briefs to be filed within 20 days after discovery is completed.

27. ACTA opposes NPRM @ ¶ 83's proposal that initial briefs be limited to 25 pages and reply briefs to 10 pages, and recommends instead that initial briefs be limited to 30 pages and reply briefs to 15 pages.

CONCLUSION

ACTA will study with interest the comments of others and consider submitting modified and/or additional suggestions, support, or opposition in reply comments.

Respectfully submitted,

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TELECOMMUNICATION ASSOCIATION**

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